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In the
Supreme Court of the United States

October Term, 1980

LEAK REPAIRS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

SUPPLEMENTAL BRIEF BECAUSE OF INTERVENING LABOR BOARD DECISION CONCEDING THE MAJOR ISSUE IN THIS CASE

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Table of Authorities

PAGE

Cases:

Colletti's Furniture, Inc. v. *NLRB*, 550 F.2d 1292 3

Mt. Healthy City Board of Education v. *Doyle*, 429 U.S. 274 ..... 1, 2, 3, 4, 5, 6

NLRB v. *Eastern Smelting and Refining Co.*, 598 F.2d 666 3

Wright Line, a Division of Wright Line, Inc., 251 NLRB No. 150 ..... 1, 2, 3, 4, 5

Statute and Rules:

National Labor Relations Act, §8(a)(3), 29 U.S.C. 158(a)(3) 3, 4

U.S. Sup. Ct. p. 23.1 5

Rules of the United States Court of Appeals for the Seventh Circuit, Circuit Rule 16(e) 4

Miscellaneous:

Remarks of Robert E. Allen, Director, NLRB Office of Appeals, in 30 *Daily Labor Report* A-4 (Feb. 12, 1980) 3

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A version (some of which is incorporated herein) of this Brief calling the Court's attention to the Board's intervening *Wright Line* decision was at the printers before we received (September 19) the Supplemental Brief of the National Labor Relations Board. The Board seemingly is so reluctant to have this Court pronounce the applicability of *Mt. Healthy* to Labor Board cases that it has filed a brief which, in our judgment, seriously misstates the proceedings below and, as we read the Brief, takes the view that if the Board simply labels serious misconduct as a "pretext" for discharge the *Mt. Healthy* discipline need not be applied.

If this is what the Board's *Wright Line* decision really says, or is the way the Board will apply *Mt. Healthy,* it is apparent it would mean that the Board paid mere lip service to *Mt. Healthy* in *Wright Line* and feels free to avoid the *Mt. Healthy* test by labeling the employer's

reason of misconduct simply as a "pretext" which need not be subjected to the *Mt. Healthy* analysis. All the more reason for definitive action by this Court.

An examination of the Supplement's footnote 2 (Supp. p. 2) and *Wright Line's* footnote 4 (Supp. 4a) and the 7th Circuit's opinion shows conflict which should be resolved either by plenary hearing or a remand of the case to the 7th Circuit to reconsider in the light of *Mt. Healthy* which that Court specifically rejected.

At page 3 of the Supplemental Brief the appellate lawyers proclaim that:

> "• • • application of the *Mt. Healthy* test to the facts here would not change the Board's ultimate conclusion in this case."

That is not for appellate lawyers to say.

The simple facts are that there was no showing that ever before had technical employees lied to Petitioner's Engineering Department about a crucial minute measurement—a lie that cost Petitioner $3,700. And regardless of whether or not lawyers think the Board would, or would not, reach the same result upon reconsideration, they do not speculate what the 7th Circuit would do.

Nor did the Court of Appeals find, as counsel assert, that Petitioner "utterly failed" in its attempt to show that Paver and Jenkins would have been fired even in the absence of union considerations. The 7th Circuit never viewed the case in that light. It viewed it from its "tainted motive" doctrine and as to the weight of the evidence simply said:

> "• • • it is far from *clear* that such a mistake, even if actually known at the date of discharge, to have been deliberate, would have resulted in the loss of employment." (Pet. 33a, emphasis supplied.)

The day after it filed its Brief in Opposition here (August 27, 1980), the Labor Board decided *Wright Line, a division of Wright Line, Inc. and Bernard R. Lameroux,* 251 NLRB No. 150 (See Appendix to Boadd's Supplemental Br.), holding it would thereafter "examine causality in [§8(a)(3) Labor Act] cases through an analysis *akin* to that used by the Supreme Court" in *Mt. Healthy.* (Emphasis supplied.) This became public knowledge through the *Daily Labor Report* of September 11, 1980 (page D-1).[1]

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[1] The chronology of the Board's resistance to and final acceptance of *Mt. Healthy* is interesting: This Court decided *Mt. Healthy* January 11, 1977. The First Circuit applied it to Labor Act cases on March 18, 1977 in *Colletti's Furniture, Inc.* v. *NLRB,* 550 F.2d 1292. But the Board neither sought certiorari nor thereafter applied *Mt. Healthy.* Two years later, March 14, 1979, a different panel, save for one judge, of the First Circuit tartly upbraided the Board in *NLRB* v. *Eastern Smelting and Refining Co.,* 598 F.2d 666. On February 8, 1980 at a National Labor Relations Board regional seminar, Robert E. Allen, Labor Board Office of Appeals Director, admitted that the Board continued to apply the in-part test of causation while the First and Second Circuits insisted upon the *Mt. Healthy* standard, and that "it seems obvious that we have got a Supreme Court issue. . . . (*Daily Labor Report,* February 12, 1980, p. A-4). The Petition for Certiorari in the case at bar was filed July 21, 1980 and mailed to the Board and the Solicitor General that day. The Board's Brief in Opposition, seeking to avoid the *Mt. Healthy* issue, was filed here August 26, 1980. The *Wright Line* decision was issued by the Board the following day, August 27. It is obvious that the finely honed *Wright Line* decision was many days, probably several weeks, in preparation and that the Board and its counsel undoubtedly knew about it when the Brief in Opposition was filed here. It is a reasonable speculation that the Petition brought the entire matter to a head.

In short, in *Wright Line* the Board conceded: (a) that "disagreement and controversy are rampant" among the circuits as to the proper test of causation in so-called "mixed motive" cases under §8(a)(3); and (b) that the proper test, or discipline, to be applied in deciding such cases is the *Mt. Healthy* test formulated by this Court. The latter concession admits the core contention of the Petition for Certiorari.[2]

The conflicts between the courts of appeal are not going to be settled by an administrative agency decision as to either cases now pending or those which will arise in the future in which a disappointed charging party who is not satisfied with a Board decision denying him reinstatement can take an appeal under §10(f) of the Labor Act.

And there are other difficulties: The 7th Circuit has a rule (Circuit Rule 16(e)) which provides that:

> "A proposed opinion aproved by a panel of this Court adopting a position which would overrule a prior decision of this Court * * * shall not be published unless it is first circulated among the active members of this Court and a majority of them do not vote to rehear in banc the decision of whether the position should be adopted."

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[2] The Brief in Opposition seeks to avoid the issue by assuming the point in question and asserting that the respondent's stated reason for firing the employees because they had given a deliberately false report of a crucial measurement was merely "pretextual" (Br. in Op. p. 5); but this ploy can no longer stand, for the Board said in footnote 4 to its *Wright Line* decision:

> "As is demonstrated herein, under the *Mt. Healthy* test, there is no real need to distinguish between pretext and dual motive cases. The distinction is nonetheless useful in setting forth the controversy surrounding dual motive cases." (Bd. Supp. Br. 4 a)

Thus, in the 7th Circuit it will take either a decision by this Court or an in banc vote of the 7th Circuit before the *Mt. Healthy* test may be applied.

We respectfully suggest that, however considered, the Board's Supplement creates confusion rather than settling anything. In the short time we have had to consider the Supplemental Brief it seems to us to indicate that it is the belief of the authors that the Board will apply *Mt. Healthy* in a limited fashion. No valid reason has thus far been adduced why *Mt. Healthy* should not be applied to Labor Board cases and we suggest this Court should so say and end the conflict and confusion that now exists.

In the unusual situation that now exists, the Court may wish to consider summary disposition of this case on the papers now before it under Rule 23.1. While the undersigned would be honored to present the case on plenary hearing, the fact is we could not improve upon the reasoning and clarity of the Court's opinion in *Mt. Healthy*. Board counsel, despite the Brief in Opposition, are now bound by the Board's views in *Wright Line* and any effort to take this case out of the *Mt. Healthy* principle, we thought embraced by the Board, would be fruitless. Petitioner does not shrink from a plenary hearing, but the Court may consider that such would be wasteful of the Court's time and Petitioner's money.

If the Court decides to treat the case summarily, Petitioner prays that it order the case remanded to the 7th Circuit with directions to grant Petitioner's Petition (not mentioned in the 7th Circuit's opinion) to Set the Board's Order Aside or, alternatively, to reconsider the case in the light of *Mt. Healthy City Board of Education* v. *Doyle,* 429 U.S. 274.

Respectfully submitted,

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